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Mr. Justice J. Hay Brown, of the Supreme Court of Pennsylvania, has signified his willingness to deliver the Commencement address before the Law School, on June 4th, 1901.

ALUMNI NOTES.

D. Edward Long, '99, is a prominent candidate for District Attorney in Franklin county.

John F. S. Morris, '94, spent several days in town quite recently. He is, at present, representing Ginn & Co. in Pennsylvania.

J. Frey Gilroy, '96, spent several days in town about April 28th. He reports having a very lucrative practice, and is also a borough solicitor for a borough in Lackawanna county.

Ruby R. Vale, '99, and Jas. B. O'Keefe spent several days in town about May 3.

Garrett B. Stevens, '99, was a visitor in town several days ago.

BOOK REVIEWS.

"American Bankruptcy Reports," on the Act of 1898. Two volumes, yearly, with monthly advance sheets. Bound in sheep, $5.00 per volume. Matthew Bender, Albany, N. Y.

Four volumes of these reports have been given to the profession and the fifth will be out soon.

The usefulness and benefits of such reports are manifest and hardly need comment but we cannot pass them by without referring to the manner of their compilation and annotations, which is perfect, and especially the indexing as to the form and its reference to the adjudication of each section of the act, being arranged to meet the wants of the busy attorney.

"The Law and Practice in Bankruptcy," by Wm. Miller Collier. Third edition, revised and enlarged, by James W. Eaton, of the Albany, N. Y., Bar, Albany, N. Y., 1900. Matthew Bender, pp. xliv, 866.

Our National Bankruptcy Act has now been in force nearly three years and during that brief period most of its sections have been judicially construed. Students and practitioners must therefore now be pro-

vided with a work which not only suggests the problems presented by the provisions of the law, but which indicates the way in which, so far as passed upon, they have been solved by the courts. Such a work is that before us. Mr. Collier and Mr. Eaton are well known as the editors of the excellent American Bankruptcy Reports, and are both acknowledged authorities on Bankruptcy Law. The original edition of the book, which was prepared by Mr. Collier and which came out two months after the enactment of the law, was very favorably received by the profession and there can be no doubt that the present enlarged and revised edition will prove just as popular.

Perhaps the most notable feature of the work is its completeness. The text proper consists of some four hundred and eighty pages, in which each section of the act is fully discussed and explained, in the light both of the decisions under the present act and of the text and construing decisions of former statutes. In addition to this, the book contains The General Orders in Bankruptcy, annotated and cross-referenced: Index to General Orders, Official Forms, Index to Official Forms, the Bankruptcy Acts of 1898, 1867, 1841 and 1800, the Rules in Equity of the United States Courts, Index to Rules in Equity, Abstracts of the Exemption Laws of the different States and Territories, List of Judges and Clerks of Bankruptcy Courts, General Index and Table of Cases.

"Where Dwells the Soul Serene," by Stanton Kirkham Davis. Cloth, pp. 220, price $1.25. The Alliance Pub. Co., N. Y.

This book is written from the standpoint of an eminently practical idealism and from the ground that the perception of the soul is the basis of freedom and thence of all true culture. The author states in his preface that, "It should be the aim of every earnest book to act in some degree, however slight, as a medium of personal truth; and herein lies its use, should it attain to the dignity of usefulness, that it shall arouse some dormant faculty, shall animate our latent perception of the Immanent Soul." That the author has reached this degree of perfection stated in his preface cannot be doubted, and any reader of the book can come to no other conclusion than that the book has fully reached the degree of perfection the author has aimed at. The key-note of the book is Love—the love of God, the love of man, the love of nature; but this is religion, and thus is it a plea for all that is true and vital in religion; religion not for set times and set places, but for all days and all times—the religion of Love. A free and rugged spirit pervades the book; it radiates health for it was written in the open air and constantly suggests the woods and fields Above all it is serene and hopeful and from beginning to end is suggestive of peace. It is an antidote for the fever and unrest of the times and carries the reader to the unexplored recesses of his own being and sets him to vibrating with the real.

"The Esoteric Art of Living," by Joseph Stewart, LL. M. Cloth, pp. 80, price $0.75. The Alliance Pub. Co., N. Y.

This book suggests original studies in the philosophy of the higher life, comprehending the concepts of advanced thought and some deductions from modern Psychical Research; the purpose being to show how the rarer knowledge of man's powers, both normal and supernormal, and their proper exercise may be rationally made the basis for a happier, healthier, profounder and loftier life, not only in extraordinary but in daily experience. A glance at the introduction will serve well to illustrate the character of the book. "For all experience (living) there is a common basis, which may be found in the inherent potential nature of man and his adjustment to environment. The diversity of expression and adjustment is as great as the multitude of individuals. Not all expressions and adjustments are happy, beneficent; wise or progressive. Surely it is desirable to discriminate and to inquire as to what will facilitate the best expression of the innate powers and possibilities and effect the most beneficent adjustment to environment."

The following is a continuation of the schedule of counsel in the Moot Court cases issued in last month's FORUM.

Case No. 147. Nicholls, Turner,
Core, Lambert.
Clark, J.

Case No. 148.	Kostenbauder,	Thorne,	
	Stauffer, C.M.,	Mowry.	
	Kline, J.		
" " 149.	Points,	Lonergan,	
	Lord,	Peightel.	
	MacConnell, J.		
" " 150.	Detrich,	Bishop,	
	Dever,	Osborne.	
	Kemp, J.		
" " 151.	Mitchell,	Holcomb,	
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	Stauffer, J.		
" " 152.	Kern,	Basehore,	
	Marx,	Edwards.	
	Valentine, J.		
" " 153.	Hoagland,	Hebriegel,	
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	Gery, J.		
" " 154.	Rhodes, J.,	Barr,	
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	Hess, J.		
" " 155.	Miller,	Cannon,	
	Kline,	Hickernell.	
	Turner, J.		
" " 156.	Donahoe,	Vastine,	
	Bouton,	Gerber.	
	Adamson, J.		

MOOT COURT.

THE HANOVER FIRE INSURANCE CO. vs. THOMAS BRADFORD.

Authority of insurance agent to appoint sub-agents—Liability of agent for the acts of such sub-agent—Extent of apparent authority of sub-agent in issuing policy of insurance.

STATEMENT OF THE CASE.

1. The defendant was the agent of the plaintiff company at New Brighton, Pa., to receive proposals for insurance against loss and damage by fire, to fix rates of premium, to receive moneys, to countersign, issue and renew policies of insurance, signed by the President and attested by the Secretary of the company.

2. The defendant maintained an office for the conducting of the insurance business, he being the agent for several insurance companies, and in the prosecution of said business he had in his employment one H. N. W. Hoyt, who not only did all the clerical work of the office, but also made daily reports of business to the plaintiff's general agent for Pennsylvania at Wilkesbarre, and further in the regular course of business and with defendant's knowledge and by his authority, solicited insurance; collected premiums, and from time to time delivered policies of insurance to the person insured.

3. The Mayer Pottery Works situate in the vicinity of New Brighton, had been insured by policies aggregating $15,000 issued by companies other than the plaintiff and these policies the insured had procured through the defendant as the representative of the companies. Shortly before July 1, 1896, Joseph Mayer, one of the proprietors of those works, addressed a letter to the defendant at New Brighton, calling his attention to the fact that these policies would expire on the last mentioned date, and desiring information whether he, the defendant, would continue the insurance in companies represented by him. In response to this letter the said H. N. W. Hoyt visited said Mayer and informed him that the policies would be renewed; and on July 1, 1896, said Hoyt, acting on behalf of the defendant, brought to said Mayer and delivered to him six policies of insurance, amounting together to $15,000, against loss by fire, upon the said pottery works and the contents thereof. One of the policies so delivered by said Hoyt to said Mayer was policy No. 307,782 of the Hanover Fire Insurance Company (the plaintiff company) dated July 1, 1896, signed by the President and attested by the Secretary of the company and purporting to be countersigned by Thomas Bradford, the defendant, as agent of the company whereby in consideration of the premium of $37.50 that company insured J. & E. Mayer and the Mayer Pottery Company, Limited, for the term of one year from date against loss by fire to an amount not exceeding $2,500, to the Mayer Pottery Works.

4. On the 8th day of July, 1896, the insured mailed a check for $225, the amount of the premiums on said six policies, payable to the order of Thomas Bradford, in a letter addressed to him at New Brighton. On July 11, 1896, this check, indorsed by said Hoyt thus—"For the credit of Thomas Bradford, agent" was deposited by Hoyt in

the defendant's bank to the credit of the defendant, as agent, in his bank account, as agent. The check was paid by the drawee to the bank.

5. Such risks as that covered by policy No. 307,782 were and had long been prohibited by the plaintiff company and the defendant knew of this prohibition.

6. Said policy was not countersigned by the defendant personally but said Hoyt countersigned the policy for and in the name of the defendant by writing the defendant's name at the proper place. This he did without authority from the defendant and without the defendant's knowledge. Hoyt delivered said policy to Mayer without the defendant's consent or knowledge. The defendant had no knowledge that this policy had been issued until after the fire and loss hereinafter to be mentioned.

7. The issuing of said policy was not reported to the plaintiff company and the plaintiff had no knowledge whatever of the transaction until after the fire and loss had occurred.

8. On October 21, 1896, the said insured property was destroyed by fire.

9. Afterwards suit was brought in the Court of Common Pleas of Beaver county, Pa., by the insured against the Hanover Fire Insurance Company upon said policy, and verdict and judgment was had against the Hanover Fire Insurance Company for $2,529.20 and costs, $43.16. Two days after the insurance company paid the amount of the judgment and costs.

10. Although Bradford was not notified by the Hanover Insurance Company to defend in the suit brought against the company in the Common Pleas of Beaver county, yet it is admitted by both sides in the present case, that Bradford had no defense to offer even had he been notified.

This is an action of trespass on the case to recover from Bradford damages for defendant's wrongful and fraudulent acts and omissions. Hanover Fire Insurance Company is a New York corporation.

F. L. HESS and W. L. SHIPMAN for plaintiff.

The so-called sub-agent was a clerk or employee of the defendant, agent. Bodine v. Ins. Co., 51 N. Y. 117; Grady v. Ins. Co., 60 Mo. 116; Con. Ins. Co. v. Ruckman, 127 Ill. 364, Story on Agency, secs. 13, 217, 387.

The agent is liable to the principal for the acts of his sub-agent. Barnard v. Coffin, 141 Mass. 37; Sun Fire Office v. Ermintrout, 11 Pa. C. C. 21; Bradstreet v. Emerson, 72 Pa. 124; Bank v. Express Co., 93 U. S. 174. An insurance agent who issues a policy forbidden by the company, is liable to the company. Ins. Co. v. Russell, 1 Spr. 320; Craber v. Ins. Co., 129 Pa. 8.

The sub-agent was acting within the apparent scope of his authority. Kitchen v. Ins. Co., 57 Mich. 145; Swan v. Ins. Co., 96 Pa. 42; Grieswold v. Gebbie, 126 Pa. 353.

W. A. VALENTINE and W. T. STAUFFER for defendant.

An insurance agent with authority to solicit insurance, collect premiums, and deliver policies has no apparent authority to contract for risks. Ins. Co. v. Johnson, 23 Pa. 72; Ins. Co. v. Holzgrafe, 53 Ill. 56; Fleming v. Ins. Co., 42 Wis 620; Ins. Co. v. Willets, 24 Mich. 267; Greene v. Ins. Co., 91 Pa. 387; Ins. Co. v. Bradford, 49 L. R. A. 530; Swan v. Insurance Co., 96 Pa. 37; McGonigal v. Ins. Co., 168 Pa. 1.

An insurance agent has the implied authority to appoint sub-agents. Bodine v. Ins. Co., 51 N. Y. 117; Arff v. Ins. Co., 125 N. Y. 57; Ins. Co. v. Eshelman, 30 O. S. 647; Krum v. Ins. Co., 40 O. S. 225.

Where an agent has the express or implied authority to appoint other agents, he will not be liable for their acts or omissions. In such case the sub-agent becomes the direct representative of the principal. McVeagh v. Douglass, 4 Phila. 69; Bank v. Bank, 11 Cush. 582; 1 Am. & Eng. En. of Law, (2d ed.) 981, and cases there cited.

The only effect of the admission "that Bradford had no defense to offer in the previous case," is to preclude the defendant from alleging that the plaintiff was negligent in not notifying him to defend in that case. Strong v. City, 62 Wis. 255.

OPINION OF THE COURT.

This was, at its inception, an action of trespass on the case. The defendants demurred specially, alleging that the form of action was wrong. In Pennsylvania the distinctions heretofore existing between trespass and case have been abolished and trespass takes the place of both. The United States courts follow the State courts in practice, pleading and forms of procedure in civil cases at law. Rev. Stat. of U. S., sec. 914; O'Connel v. Reed, 5 C. C. A. 586; Glenn v. Sumner, 132 U. S. 152. In this suit trespass on the case was proper at common law. Kraber v. Insurance Co.,

129 Pa. 8. Trespass is proper now. Assurance Co. v. Russel, 1 Spr. 320. The defendant was allowed to amend to trespass without granting a continuance. See Marse v. Clem, 4 Pa. C. C. 118; Noll v. Crosscup, 3 Pa. C. C. 431.

Under the facts, as found by the jury in their special verdict, is the insurance agent, Bradford, liable for the acts of the sub-agent, Hoyt?

As a general principle, an agent cannot delegate his authority. So far as relates to ministerial duties, and under an established custom, as to his duties in general, this rule does not apply. It is well settled that an insurance agent with general powers can delegate his authority to others and their acts will be as effective as his own. Bodine v. Ins. Co., 51 N. Y. 117; Arff v. Ins. Co., 125 N. Y. 57; Carpenter v. Ins. Co., 135 N. Y. 298; Grady v. Ins. Co., 60 Mo. 116; McGonigle v. Ins. Co., 168 Pa. 1; Ins. Co. v. Eshelman, 30 Ohio S. 647; Krum v. Ins. Co., 40 O. S. 225; Swan v. Ins. Co., 96 Pa. 37; Ins. Co. v. Ruckman, 127 Ill. 364; s. c. 11 Am. St. Rep. 121.

An agent can never delegate the obligations which he owes to his principal. Sometimes an agent has the power, express or implied, to appoint other agents. He may be given the power to make a contract of employment for his principal, just as he may be given the power to make any other contract for him. In such case the agent will only be answerable for due care and fidelity in selecting a competent person. He will not be responsible for the acts of such additional agent. So far as we can discover, the question as to the power of an insurance agent, such as Bradford, to appoint sub-agents and thus be relieved from responsibility for their acts, has never been expressly answered. Numerous cases have been cited by the counsel in which the insurance companies have been held bound by the acts of sub-agents, exercising powers similar to those of Hoyt in this case. (See cases cited *supra*.) But it is obvious that those cases form no precedent for this one. Whether such sub-agents were the result of a power of appointment residing in the agent, by which the former came into privity with the principal, or whether the sub-agents were simply employees of the agent, would make no difference so far as those decisions are concerned. The insurance company would be liable in either case.

If Bradford is to be held relieved from responsibility for the acts of Hoyt it must be upon the theory that the former had the power to appoint other agents; that is, to enter into contracts of employment for the company. We do not think that such power can be implied from the facts as found. He undoubtedly had the right to delegate his authority to such an extent as was necessary to carry on his business. But this delegation would not enable him to shift his obligation. Hoyt did not come into privity with the insurance company. For instance, he could not have recovered from them his compensation. Fairchild v. King, 102 Cal. 320. Insurance companies do have agents whose express duty it is to employ other agents, but of course Bradford was not of this class. He was an agent appointed to look out for the business interests of his employer with regard to the procuring of insurance in a particular locality. The cases in which agents have been held to have the power to appoint additional agents, have not been at all similar to the case under consideration. They are nearly all cases of commercial agency, or of banks collecting through other and distant banks. All of the cases cited by the counsel for the defense fall within this class. The reasons for relieving the agents in such cases do not apply here. See McVeagh v. Douglass, 4 Phila. 69; Bradstreet v. Everson, 72 Pa. 124; Bank v. Goodman, 109 Pa. 422; Bank v. Bank, 112 U. S. 287. Hoyt, then, was the agent of Bradford.

But there is another argument advanced by the defendant which is more meritorious and which, in our opinion, prevents a recovery. It is that Hoyt exceeded his actual and apparent authority in issuing this policy. Bradford had given to his sub-agent the authority to perform certain ministerial duties, such as soliciting insurance, collecting premiums, and delivering policies of insurance. It has many times been decided that an agent empowered to perform such functions has no authority to make a contract of insurance. Ins. Co. v. Johnston, 23 Pa. 72; Fleming v. Ins. Co., 42 Wis. 620; Greene v. Ins. Co., 91 Pa. 387; 16 Am. and Eng. En. of Law

915 (2d Ed.) and cases there cited. See also Ins. Co. v. Willetts, 24 Mich. 267. Bradford alone had the right to perform the discretionary act of effecting a contract of insurance by countersigning the policy. We have been pointed to no case which holds that this duty can be delegated to a sub-agent. The court in Ins. Co. v. Ruckman, 127 Ill. 364; s. c. 11 Am. St. Repr. 121, intimates that if the act performed by the sub-agent there had been a discretionary one, the company would have been held not liable.

The insured in this case knew that Bradford was the general agent of the company and that Hoyt was but a sub-agent. Yet in no part of the transaction leading up to the securing of this policy did he deal directly with Bradford. He was bound to know that Bradford alone could issue a policy. The fact that he took the policy without actual notice does not render Bradford liable. Is one whose name is forged to a document like this, to be held responsible for it, because the one acquiring it has no knowledge of the forgery?

Counsel for the defendant have called our attention to the existence of the analagous case of Bradford v. Hanover Fire Ins. Co., reported in 49 L. R. A. 530, in which a conclusion, in accordance with the judgment in this case, was arrived at by the Circuit Court of Appeals of this circuit.

Judgment for defendant.

W. S. CLARK, J.

OPINION OF THE COURT.

A policy purporting to be that of the plaintiff company was delivered to the Mayer Pottery Works, and, a fire subsequently occurring, the works, in an action upon the policy, recovered a judgment for $2529.20 with costs $43.16. What defences were attempted we can only surmise. They may have been (1) that the agent, Bradford, had no authority to issue policies on potteries (2) that the policy had not been countersigned by nor delivered with the authority of Bradford.

It is clear that if either of these would be valid, Bradford is not liable in this action. There should have been no recovery in the suit upon the policy, and Bradford not having participated in the defence cannot be made responsible for its miscarriage.

Certain facts were presented to the jury from which, it was argued, that Bradford was not liable. But the argument would have shown that the Insurance Company also was not liable. In addition to these facts we have the solemn admission of Bradford "that he had no defence to offer (in the trial on the policy) even had he been notified." The specific facts it is urged, show non-liability of Bradford. The admission shows liability of the company.

A little reflection will, we think, discover either that the facts do not support the legal inference drawn from them, or that they are inconsistent with the admission. In such a state of the evidence, it would have been the duty of the court to allow the jury to decide whether the facts were as specifically averred, or as the concession of the defendant implied that they were. The learned court, nevertheless, gave a binding instruction to the jury to find for the defendant. This we think, was error. By admitting that the Mayer Pottery Works ought, in law, to have recovered upon the policy, the defendant admits the existence of all the facts necessary to support this right to recover. What are these facts?

The company had no contract, it is admitted, with the works except through Hoyt, and it had no contract with Hoyt except through Bradford. Nothing is suggested which could give color to the hypothesis that although Hoyt was employed by Bradford, the latter, as agent to employ him, employed him for the company and not for himself. Nothing shows that Bradford had power to appoint an agent for the *company*. Nothing shows that, if he had, he attempted to exercise such power. Bradford is agent for several Insurance companies. *He* had "in *his* employment" Hoyt, who did all the clerical work, made daily reports in Bradford's name, evidently, to the general agent at Wilkesbarre, by the authority of Bradford—not that of the company—solicited insurance, collected premiums, and delivered policies. When the Mayer Pottery Works wanted insurance, it wrote not to Hoyt, but to Bradford. Hoyt as Bradford's employe, conferred with the works, promised the policy and afterwards

delivered it. The premium paid to Hoyt, he deposited to the credit of Bradford. We may therefore dismiss all consideration of the supposition that Hoyt had been made an agent of the company and that in his acts he was its direct representative. He was the employe of Bradford.

Hoyt being the employe of Bradford, how could it happen that the policy delivered by him to the Mayer Pottery Works made a valid contract? Evidently the acts of Hoyt are imputable to Bradford, and, *therefore*, imputable to the company. The company acted in and by Bradford; Bradford acted in and by Hoyt. In admitting, as he did, that the works must in law recover, Bradford therefore admitted that in law the acts of Hoyt were imputable to himself. He was the nexus between the company and Hoyt, as Hoyt was the nexus between him and the works.

There are but two theories on which this imputation is legally possible. Either Bradford had authorized Hoyt to do what he did, or he had justified the works, by what he did or by what he refrained from doing, in thinking that he had authorized Hoyt to do what he did. It appears rather clearly that Bradford had not authorized Hoyt to do what he did. It does not clearly appear that he had not warranted the works in supposing that he had. This concession therefore that the company was bound by Hoyt's act (that being possible only if the appearances made the company liable, for which appearances, plainly, Bradford was responsible) is practically a concession that he had "held out" Hoyt to the Mayer Pottery Works as authorized to do what he was doing. The admission therefore ought to have been submitted to the jury with proper instructions.

But, had there been no admission of the sort, we are convinced that the facts proven would have warranted a finding by the jury that Bradford had "held out" Hoyt as authorized to do what he did; that is, had so acted, or abstained from acting, as to justify the Works in thinking that the policy had been delivered for him, with his assent. When such are the acts or omissions of the employer, it is not, we think, necessary to brand them as negligent in order to make him liable for the acts of the employee. It is enough that for his own purposes he so relates himself to another as to justify strangers in thinking that the other is acting vicariously for him. If A should put a horse into B's custody, with instructions to sell him for so much, but not to receive the price in cash, but only in a check payable to A, and the vendee should, without knowledge of this instruction, pay the price in cash, it would hardly be contended that he would be obliged to pay it a second time should B fail to pay the money over to A. Huffcut Agency, 108. This would not be because A was negligent, but on the ground that he has made it possible for B to receive the payment in cash without the vendee's knowing of the prohibition. A could do nothing to give notice to a possible purchaser of the limit to B's authority, and therefore could not with any propriety be accused of negligence. If negligent at all, his negligence would consist in employing any agent to sell and deliver the horse, with such a restriction upon his power. While the person who deals with the agent must be free from negligence in drawing his inferences from the facts pertaining to the representative relation of the agent, in order to bind the principal for acts in excess of the agent's power, it does not follow that in order to bind the principal there must be negligence on his part. He takes certain risks of the misconstruction of the powers of his agent, whether he is negligent or not. These risks are an unavoidable incident to any industrial activity which involves the employment of an agent. Those who deal with his agent are given rights as against him, though his only choice was either to employ no agent at all, or to expose himself to liabilities towards those who have misapprehended the scope of the agent's power. We do not think it necessary, therefore, that there should be negligence in Bradford to justify a decision that he is responsible for the acts of Hoyt.

It is urged that Bradford had not authorized the delivery of the policy, and had not countersigned it. He might have delivered it without countersigning, and it would probably have been valid. Meyers v. Ins. Co., 27 Pa. 268. The complaint is, that, in excess of his authority, Hoyt de-

livered a policy without action upon it by Bradford. Let us concede, as we probably must, that the Pottery Works must have known that a policy, whose issue had not been acted on by the agent, would not be valid. Nevertheless, how were they to know whether it had been acted on by Bradford or not. Must they know the hand-writing of Bradford, and determine for themselves whether the counter-signature was written by him? Even that would not be enough, for there would still remain the question whether, after signature, it had been delivered by him to Hoyt for transmission to the assured. Must then the Works have inquired and taken the risk of the thoroughness of their investigation, whether Bradford, though he had signed the policy, had authorized Hoyt to deliver it? Mayer obtained the insurance by correspondence with Bradford. The answer came in a personal interview with Hoyt. Hoyt delivered the policy. We are not prepared to say that it was the duty of the Works to suspect that something was wrong, to refuse to accept the policies from Hoyt, to insist on a personal interview with Bradford, and on an assurance by him that the counter-signature was his own, and that Hoyt had delivered the policy with his authority. Nor, on the other hand, are we willing to say that, unless Bradford was negligent in some way, neither he nor his company can be held responsible.

It must be remembered that an agent may be such to make representations concerning facts, and that, when he is such, and when he makes representations, they will bind the principal. Mentz v. Lancaster Fire Ins. Co., 79 Pa. 475. Hoyt was admittedly Bradford's employee to deliver policies. This function included that of giving information to the assured concerning the facts connected with the policy. His act of delivery was a tacit declaration that the policy had been delivered to him by the agent, and that the counter-signature to it was genuine. He could know these facts; the assured could not. In the nature of things the latter would have to rely upon the employee. The jury might, we think, have properly inferred that Hoyt had Bradford's authority to give assurance to customers as to the execution of the policies, and that being so, the conclusion would follow that Hoyt's representations, though untrue, would bind Bradford.

It is said that Hoyt committed a forgery in signing Bradford's name to the policy. That is a mere question of names. If for one man to write another's name to a paper without the authority of the latter, is a forgery, then, to say that it was a forgery is simply to say again that Hoyt wrote Bradford's name without authority. It does not follow that Hoyt was guilty of a crime. He may have believed that he had justification for writing the name. We are not to believe that he committed a crime till the evidence becomes clearer than it is. But, whether the act is criminal or not, is not decisive of the liability of Bradford. A man may be liable even on a forged document. He may become liable by his having uttered it in such a form that forgery would be easy, and more or less likely. Bolles, Negot. Inst., 78; Leas v. Walls, 101 Pa. 57. The important question is, had Mayer justification for assuming that the policy was delivered with the authority of Bradford, and did Bradford occasion the appearances that justified this assumption? The unauthorized act might be the delivery, or the countersigning; and the law may criminalize the latter and not the former. Both, let us suppose, must exist, or must seem to exist, in order to create rights as against Bradford. But surely the principle does not differ on which he may have imputed to him the delivery from that on which he may have imputed to him the counter-signature. He might have authorized Hoyt to put his name to the policy or not, just as he might have authorized Hoyt to hand the policy over or not. The important fact is, that acts essential to the rise of an obligation have been done without authority. It is entirely irrelevant to inquire whether the unauthorized doing of one of these acts is censured criminally, while the unauthorized doing of the other is censured only civilly. It is as much the duty of men to anticipate crime, and to refrain from furnishing the occasions of it, as to anticipate other injurious acts. At all events, we are not prepared to say that no man can be liable on an act of assumed

agency because that act has included in itself the unauthorized writing of the principal's name.

If, then, in the opinion of the jury, Mayer, in the exercise of caution and intelligence, was led to think, from the apparent relation of Hoyt to Bradford, that Hoyt had authority from Bradford to deliver the policy as one countersigned by himself, their verdict should have been for the plaintiff. One of two innocent parties must suffer. He, whose employment of a too little scrupulous substitute has led to the loss, must bear it. The case should have been submitted to the jury.

The able opinion of the learned judge cites a case in 49 L R. A. The decision of that case only partially sustains his opinion. It does not appear therein that the defendant made any admissions as to his inability to oppose a successful defense to the action on the policy. With deference to the learned judge who wrote the published judgment, we are not convinced that the mere fact that Hoyt's actual authority was merely to deliver policies, after Bradford had signed the policy and ordered him to deliver it, vitiated any delivery of a policy made without this actual signature and authority.

Judgment reversed with v. f. d. n.

SEYMOUR BATES vs. A. & B. RAILWAY CO.

Negligence—Violation of ordinance—Fires by R. R. engines.

STATEMENT OF THE CASE.

Action in trespass.

A city ordinance of Columbia requires all buildings within a certain district known as "fire limits" to have slate or metallic roofs. Another ordinance prohibits trains passing through the city at a greater rate of speed than six (6) miles an hour. Defendant ran its trains at the rate of ten (10) miles an hour, causing its engine to emit burning sparks some of which fell on the roof of plaintiff's house—which was within "fire limits" and had shingle roof. A fire resulted and plaintiff sues for damages.

OSBORNE and KOSTENBAUDER for plaintiff.

The negligence of the plaintiff is no bar, for defendant, by exercising ordinary care, might have prevented injury. 139 U. S. 651.

Plaintiff's negligence was remote cause of injury and he may recover. 92 Pa. 475, 11 Harris 372.

MCKEEHAN and MOON for defendant.

Failure to comply with ordinance not in itself negligent. Connor v. Traction Co., 173 Pa. 602; Lideman v. R. R. Co., 163 Pa. 110.

Fact of fire is no evidence of negligence. R. R. v. Yerger, 73 Pa. 121. R. R. v. Jerser, 8 Pa. 374.

OPINION OF THE COURT.

In this case we find both plaintiff and defendant guilty of violating a city ordinance. A violation of a city ordinance is not in itself proof of negligence. This point is well sustained in the case of Lederman and wife v. The Penna. R. R. Co., 166 Pa. 118.

The fact that the plaintiff allowed his house to be roofed with shingles and to be situated close to the railroad is not sufficient evidence to charge him of being guilty of contributory negligence. Basing our decision upon that of Justice Agnew's in the case of The Phila. & Reading R. R. v. Henderson, 80 Pa. 182.

The defendant in this case has violated the ordinance by running its train at the rate of ten miles an hour. The ordinance prohibiting a greater rate of speed than six miles an hour. This, as we ruled in the beginning, is not in itself but might be taken with other facts by jury to determine whether or not they were negligent, 166 Pa. 118.

There was proof that the defendant caused its engine to emit burning sparks which fell upon the roof of plaintiff's house and caused the fire complained of in this action. At this particular point we deem it a question for the jury to consider whether or not the fire which did damage to plaintiff's house was caused by the engine from the fact that it was run at a greater rate than six miles an hour. If jury so find then verdict must be for the plaintiff in this action.

HARRY M. BROOKS, J.

OPINION OF THE SUPERIOR COURT.

We fail to see on what ground the jury was allowed in this case to convict the defendant of actionable negligence. An or-

dinance of the city forbade the passage of trains at a greater speed than six miles per hour, and the locomotive, the sparks from which set fire to the plaintiff's house, was running at the rate of ten miles per hour.

The ordinance is the expression of the opinion of the city councils as to the maximum safe rate of motion, and possibly as such—though it is difficult to see on what principle—it is evidence that a greater rate is negligent, Connor v. Traction Co., 173 Pa, 602; Lederman v. R. R. Co., 166 Pa. 118. But this greater rate of speed is dangerous, not because of the increased emission of sparks, but because of the enhanced likelihood of collisions with objects upon or crossing the tracks. It is too well settled that an act of negligence which does not produce the injury complained of does not make the defendant liable for it, though such act might make him liable for a result which did flow from it, to need citation of authorities. We fail to discover any causal relation between the speed of the defendant's train and the fire, nor, as we think, should the court have allowed the jury to speculate upon such a relation.

The learned court below refrained from giving instruction to the jury as to the effect on his right of action of the plaintiff's violation of the ordinance concerning slate or metallic roofs. If the ordinance respecting speed was evidence on the question of the negligence of the defendant, it is difficult to see why the ordinance concerning roofs was not evidence on that of the plaintiff's negligence. We think, however, that in the absence of further evidence, a jury would not have been justified in finding the non-observance of the directions of councils such contributory negligence as should preclude a recovery. Nor would the mere fact that the act of the plaintiff in maintaining a wooden roof was a violation of municipal law preclude his recovering. It exposed him to such penalties as the ordinance prescribed, but it did not put him beyond the protection of the law against acts of malice or negligence.

Judgment reversed and v.f.d.n. awarded.

CHARLES MUNSEY, TRUSTEE, vs. HENRY WILLIAMSON.

Bankruptcy—Option—Tender.

STATEMENT OF THE CASE.

Henry Williamson is the owner of a hotel which he leased to Thompson & Bro. at an annual rental of $7,000, the lessee to have the privilege of purchasing the property at $62,000. The lessee agreed to take the property whenever the owner should offer the deed, which at the time of making the agreement he was unable to do owing to a defect in the title. The payments made on account of the rent were to be applied to the purchase price, provided they exceeded the amount of the interest and taxes on the property. The payments made exceeded this amount. On Sept. 4, 1900, Thompson & Bro. were adjudged bankrupts. On September 20 Williamson offered the deed to John Thompson, one of the firm of Thompson & Bro., who refused to accept it, claiming that the notice was too short, and that he must consult his brother before giving a definite answer. The next day Williamson sold the property for $8,000 more than the purchase price named in the lease with Thompson & Bro.

The trustee in bankruptcy brings this suit to recover the amount. The deed was never offered to the trustee, who, however, is not now or was not then in a position to accept the same.

F. H. RHODES and MCCONNELL for plaintiff.

1. Right under the contract passed to assignee. 16 A. & E. Encyclopedia 726. Bank v. Horn, 17 How. 157; Norris v. Lams, 1 Phila. 23.

2. Payment to bankrupt after commencement of proceedings in bankruptcy does not affect right of assignee. Wickersham v. Nicholson, 14 S. & R. 118.

POINTS and MCINTYRE for defendant.

1. Williamson had right to sell. Massey v. Blair, 176 Pa. 35.

2. Tender of performance was unnecessary. Wilson v. Buchanan, 170 Pa. 20; Hocking v. Hamilton, 158 Pa. 112.

OPINION OF THE COURT.

We have in the case at bar two separate agreements. First, we have an agreement under seal for an option on the property in favor of Thompson & Bro. There is no

evidence in the case that an actual consideration was contracted for, but the presence of the seal imparts a consideration (Candors Appeal, 27 Pa. 119; Meek v. Franz, 171 Pa. 632) and the option is therefore a binding contract. The second agreement is that Thompson & Bro. will take the property whenever Williamson shall offer the deed. This second agreement does not discharge the prior contract (Palmer v. Yager, 20 Wis. 97) because it was not agreed that it should discharge, and the second was not inconsistent with the first. On the contrary it was rather in furtherance of the objects of the first. This then left the parties in the same position, so far as this case is concerned, as they were under the original agreement, and Williamson is therefore bound to convey to Thompson & Bro. when they choose to take advantage of the option.

With affairs in this condition Thompson & Bro. were adjudged bankrupts. A few days later Williamson offered a deed to one of the Thompson brothers who refused it. Williamson then sold. The defendant claims that this refusal ended the option and absolved Williamson from any liability. The answer to this contention is determined by answering the question whether Thompson & Bro.'s rights were under the contract passed to the trustee.

At the date of the adjudication all the title of the bankrupt to "property which prior to the filing of the petition he could by any means have transferred" was by operation of law vested in trustee (U. S. Bankruptcy Law of 1898, §70, par. A). Now, the right of Thompson & Bro. in the option was thus assignable by them (Kerr v. Day, 14 Pa. 112), and therefore passed to the trustee, Munsey. As the bankrupt's right passed to the trustee, the refusal of the deed offered to one of the bankrupts was practically a refusal by one who had become a third party, and did not therefore affect the rights of the trustee. The trustee has, therefore, a right to take advantage of the option.

But the defendant claims that the fact that the trustee was not and still is not in a position to accept a conveyance, releases him from any liability under the contract. This position we consider untenable. The option was assignable and the trustee could have secured some valuable consideration for the assignment. To this the trustee and the creditors of the bankrupt are surely entitled.

We do not think the case of Kellow v. Jary, 141 Pa. 144, applicable to the case at bar. The decision of that case was based on the fact that the option was not exercised for four years, the value of the land meanwhile increasing. No such delay appears in the case at bar and the trustee was therefore under no obligation to tender the purchase money. Besides, the tender of the purchase price in the case at bar is needless, because the defendant has already made a performance by himself impossible, and thereby committed a breach of contract for which he is liable in damages (Newcomb v. Brackett, 16 Mass. 161.)

Judgment must be entered for the plaintiff for $8,000.

W. T. STAUFFER, J.

OPINION OF THE SUPREME COURT.

The contract between Williamson and Thompson & Bro. was one of sale. The so-called "lessee" "agreed to take the property whenever the owner should offer the deed." The $7,000 "rental" was to be applied to the annual interest of $62,000 and the annual taxes, and the residue was to be credited upon the $62,000, the price of the land. The balance of the $62,000 was to be paid, when the deed should be tendered. The contract was, in no sense, an option to buy. The evidence is not clear upon this point, but apparently Williamson has the option to sell, since the agreement was to take the property when the deed should be offered.

How soon after the making of the contract, and after how much of the "rentals" had been paid, we do not know, but on September 4, 1900, Thompson & Bro. were adjudged bankrupts. On September 20th, sixteen days afterwards, Williamson offered the deed to John Thompson, one of the bankrupts, and it was declined. Williamson was not bound to offer it, still less after it had been declined was he bound to offer it again. He was under no larger duty towards the trustee in bankruptcy than he had been to Thomp-

son & Bro. No intimation was given to him by the trustee that he would be expected to convey the land to the trustee. We see no ground on which the trustee can recover the difference between the price obtained at the second sale and the $62,000.

If the evidence required us to consider the contract as binding Williamson to convey, and Thompson & Bro. to receive and pay for the conveyance, we should be unable to conclude that the trustee should recover the amount which he has been permitted to recover by the learned court below. The vendees were to pay the money whenever the deed should be tendered. The contract obliged Thompson & Bro. to pay this money. Though they had been adjudged bankrupts, they had not been discharged from this duty. It was proper for Williamson to tender the deed to them in order to consummate it. Had they paid the money, the deed would have inured to the benefit of the trustee. As the $62,000 was a charge on the equitable title of the trustee, he would not be bound to pay it, but might have relinquished the estate along with the encumbrance. There is no probability that he had the funds with which to pay so large a sum. At all events, he should have given the vendor reasonable notice that he had succeeded to the position of the bankrupts and would fulfill their duty and expect a conveyance. He did not do this. Nor, so far as appears, was Williamson aware that the vendees had become bankrupt.

This is an action for damages for the breach of the contract of Williamson. But Williamson has not broken his contract. He has tendered the deed to his vendee, apparently without notice that anybody has acquired an interest in the contract. The deed has been rejected. There was no duty to repeat the tender, and certainly not until some intimation was given him that the second would meet with any better reception than the first. So far as appears, had the tender been made to the trustee, at any time, he could not nor would have availed himself of it. He is the plaintiff. He must show that he would have become the owner of the land, and would have consequently made the profit of $8,000, had Williamson offered to him the deed. He has not attempted to show this. On the contrary it distinctly appears that he has never been in a position to accept the deed. He has waited until Williamson has found another purchaser, and then, without regard to his own inability and unreadiness to comply with the contract, had a deed been tendered to him, he seeks to appropriate the profits made by Williamson on the sale. This it would be inequitable to allow him to do.

Judgment reversed.

GRANT RICHWELL vs. POSTAL TELEGRAPH CO.

Damages—Action by addressee of telegram.

STATEMENT OF THE CASE.

William Richwell, a brother of the plaintiff, became seriously ill in Pittsburg. He asked his son to telegraph his brother to come to him at once as he desired to arrange some business matters with him before his death. The son delivered a telegram to the defendant company, paying for the same. Though the plaintiff was well known in the community no effort was made to deliver the message to him for one day after. Had it been delivered promptly, the evidence shows he could have reached the bed side of his brother two hours before his death. He brings this action to recover $2,500 for damages sustained in failure to arrange his business matters, and $1,000 for the worry and distress occasioned him, in all $3,500.

GROSS and GERBER for plaintiff.

1. The addressee is entitled to sue. Tel. Co. v. Dryburg, 35 Pa. 298; Milliken v. Co., 110 N. Y. 403.

2. The company is liable for negligence, and the delay is evidence of negligence. Tel. Co. v. Wenger, 55 Pa. 662; Rittenhouse v. Tel. Co., 44 N. Y. 263.

JONES and CAREY for defendant.

1. The damages must be restricted to a pecuniary loss. Smith v. Tel. Co., 150 Pa. 561; Gordhart v. R. R., 171 Pa. 1; Baker v. R. R., 142 Pa. 503.

2. The addressee must prove loss beyond reasonable doubt. Rose v. Tel. Co., 34 How Tr. Rep., 308.

OPINION OF THE COURT.

The law in Pennsylvania is well established, that the sendee of a telegram may maintain an action for damages sustained by the negligence of a telegraph company in transmitting or delivering a message.

In New York & Washington Telegraph Co. vs. Dryburg, Woodward J. said: "Telegraph companies are, in some sort, public institutions, open alike to all, and are largely used in conducting the commerce of the country. When a man receives a message at the hands of an agent of such a company, and does not act upon it, it seems reasonable that, for all purposes of liability, the telegraph company shall be considered as much the agent of him who receives the message as of him who sends it." 35 Pa. 298; 9 Phila. 88; Harris v. W. U. Tel. Co., 101 N. Y. 403; Milliken v. W. U. Tel. Co.

After a careful perusal of the law of negligence, we consider this a clear case of negligence.

In actions against telegraph companies for negligently transmitting or delivering a dispatch, it is universally held that proof of an improper transmission or of a delay in delivering raises a presumption of negligence against the company and casts the burden of proof upon it to show that the delay was due to other causes. In the case in hand, the company offered no cause for the delay. A delay of twenty-four hours is an unreasonable delay, without showing good cause, which entitles the one injured to such actual damages as he has sustained by failure to deliver. U. S. Tel. Co. v. Wenger, 55 Pa. 262; Ferguson v. Tel. Co., 178 Pa. 377; W. U. T. Co. v. Griswold, 37 Ohio 303; Pearsal v. W. U. T. Co., 124 N. Y. 256.

The next question to be considered, was the face of the telegram sufficient to inform the company of its importance and prompt delivery. The general rule is, if nothing on the face of the telegram purporting its importance and urgency, the party injured can recover of the company nothing more than nominal damages, or at most the price paid for transmission. In the case at hand, there was sufficient upon the face of the telegram to notify the company of its importance. The face of the telegram read: "Come at once as I desire to arrange important business matters with you before my death." Nothing could be plainer than the import of this telegram.

In Ferguson v. Tel. Co., McCullom J. says: "It seems reasonable that where damages are claimed for mere delay in delivery, the face of the telegram ought to contain something to put the company on its guard. A delay of a day, or even a few hours, might cause a heavy loss." 178 Pa. 377; W. U. Tel. Co. v. Landis, 21 W. N. C. 38.

In W. U. T. Co. v. Sheffield, the telegram was this: "You had better come and attend to your claim at once," imports notice of its purpose, and of the importance of its prompt delivery, so as to bring such matters into the contemplation of the parties in the contract for its transmission. 10 American Reports 790.

The next question is the measure of damages. A party who has failed to perform his part of the contract cannot be held liable for remote, speculative or uncertain results. The measure of damages for breach of contract is such as may fairly and substantially be considered as arising naturally from the breach, or for whatever damages may fairly be supposed to have been within the contemplation of the parties had they known at the time of the contract the facts affecting it. The plaintiff has proved that he has sustained an actual loss of $2,500 which he is entitled to recover. U. S. Tel. Co. v. Wenger, 55 Pa. 262; Tel. Co. v. Dryburg, 35 Pa. 298; Tel. Co. v. Landis, 21 W. N. C. 38; Smith v. W. U. T. Co., 150 Pa. 561; Squire v. W. U. T. Co., 98 Mass. 232; W. U. T. Co. v. Sheffield, 10 Am. Reports 790.

Next is the question of mental anguish. We have carefully considered the question, and our conclusion is that upon principle, and the weight of authority, damages cannot be recovered from a telegraph company for mental anguish resulting from simple negligence in the prompt delivery of a telegram, as the same are too remote and speculative. Such injuries are generally more sentimental than substantial. There is no possible standard by which such an injury can be justly compensated, or even approximately measured.

In this case the plaintiff asks for dam-

ages, simply for mental anguish, without showing his health has been injured, or any of his faculties impaired. Fox v. Bookey, 126 Pa. 164; Ewing *et ux.* v. P. R. R., 147 Pa. 40; P. R. R. Co. v. Books, 57 Pa. 339.

The defendant undertook to transmit and deliver this message with reasonable diligence and despatch, and by a delay of twenty-four hours the plaintiff has sustained an actual loss of $2,500 which he sustained by negligence of said defendant in not delivering the message. Verdict for plaintiff for actual damage sustained ($2,500).

W. S. DETRICK, J.

C AND D vs. B.

New trial—Does public officer become agent of person employing him?—Notary public.

STATEMENT OF THE CASE.

Action of assumpsit. Motion for new trial.

A had a paid up policy on his life for nineteen hundred and seventy-three ($1973) dollars, payable on his death to his two children—C and D.

B, a banker, loaned A three hundred ($300) dollars and this policy was assigned as collateral. B at the time he made this loan held another note of A's for twelve hundred and fifty ($1250) dollars, which was unsecured and not covered by this assignment.

Subsequently, a year later, A applied to B for another loan of three hundred ($300) dollars, which B refused to grant unless A would procure him an absolute assignment of said policy to secure him upon the twelve hundred and fifty ($1250) dollar note as well as the three hundred ($300) dollars asked for and the three hundred ($300) dollars which had been previously granted. To this A assented. B procured a blank, filled it out and gave it to the Notary to go and take the acknowledgments of C and D. This was done and the assignments returned to B, who after approval by the Insurance Company extended A the last loan upon the strength of it.

Ten years later A died and the Insurance Company paid the face value of the policy ($1973) to B. C and D sued B for the difference between the two three hundred dollar notes with interest and the face value of the policy, alleging that B promised that said assignments should be only as collateral for the two three hundred dollar notes.

On the trial plaintiffs testified that the Notary made the above representations and they were induced by them to make the assignment.

The Court charged the jury—"That if the Notary did make such statements and C and D believed they were true and that he had authority to make them and C and D were induced by said declarations to execute the assignment, they should find for plaintiff, upon the principle that having reaped the benefits of the Notary's act B must also bear the burden."

ADAMSON and DAVIS for the motion.

The Notary did not become an agent, Lewans v. Weaver, 121 Pa. 267.

There being no evidence of agency, the charge of the court was erroneous.

MCKEEHAN and J. RHOADS for plaintiff.

The notary was the agent of B, he was authorized by B and acted for his benefit. Lewans v. Weaver, 121 Pa. 285.

The principal is chargeable with his agent's representations. The declarations of the agent were admissible. R. R. v. Decker, 82 Pa. 123; Furniture Co. v. School Dist., 122 Pa. 494.

OPINION OF THE COURT.

A careful consideration of this case leads us to the conclusion that error was committed during the trial of the cause. We cannot support the contention of counsel for the plaintiff, that the engaging of the notary to do an act in his official capacity made him the *agent* of the person employing him.

Taking the acknowledgement of the policy was a judicial act. Cover v. Manaway, 115 Pa. 328; which the notary could not lawfully refuse to do when requested by B. If B compensated him for his services, he did so not because the notary had been employed as agent, but because he was a public officer doing a judicial act for which the law permits him to receive compensation.

The cases of Mundorf v. Wickersham, 63 Pa. 87 and Wheeler & Wilson Co. v

Aughey, 144 Pa. 398, bear no analogy to this one. In both those cases a private person was employed to do an act in his private capacity, while in this case the notary was engaged to do an act *in his official capacity* as a public officer, and which he as a private person was incompetent to do

It is true that if the notary was the *agent* of any one he was the agent of B; Lewans v. Weaver, 121 Pa. 285, but we can see no evidence that he acted as agent; certainly the engaging of a public officer to do an act in his official capacity does not make him the *agent* of the person employing him. We do not think that the case of Lewans v. Weaver is authority for such an assertion. In that case all that was decided was that the notary was not the agent of the mortgagee, furthermore, in that case the notary acted as scrivener in addition to taking the acknowledgment; in other words he did one act as a private person and another as a public officer. And Mr. Justice Green says "there is ample evidence to justify the inference that it was he (the son whose debt the mortgage was to secure) who employed the *scrivener* and who stood in the relation of principal to the latter as agent." The learned Justice uses the word *scrivener* not *notary*, so the case is authority for the proposition that the notary acting as a private citizen, to wit: as a scrivener, was the agent of the person employing him, a perfectly legitimate conclusion, but nothing is decided or even said by the Justice that shows the notary was the agent of the person employing him, when he acted as a public officer and took the acknowledgment. The contention that the declarations admitted in evidence was sufficient proof of the agency to warrant the submission of the question to the jury cannot be supported. It has long been settled that the declarations of an agent are not admissible to prove his agency. Relief Association v. Post, 122 Pa. 579. The notary was not called as a witness but his declarations were admitted, this could not be done until his agency had been proven.

The rule for a new trial is therefore made absolute.

W. A. VALENTINE, J.

COM. vs. BROOKS ET AL.

Act June 8, 1881—Meaning of "wilfully."

STATEMENT OF THE CASE.

The defendants were indicted for a violation of the Act of June 8, 1881, P. L. 85, section 1; P. & L. Dig. Col. 1268, section 438, entitled "An Act as to posting advertisements on walls and buildings."

James Evans was the owner in fee of a store-building, of which Silas Mohn was the tenant. Defendants procured from Mohn a written lease to use the wall for the purpose of painting thereon an advertisement of "Quaker Oats." As part consideration, they also painted on it an advertisement of Mohn's business. The tenant was a tenant for years, not restricted from subletting. Defendants painted both signs on the gable end of the building. Evans prosecuted. At the trial a special verdict was taken in the usual form as to whether the facts constituted a violation of the provisions of the aforesaid Act.

WALSH and WRIGHT for the Commonwealth.

The tenant's consent does not relieve the defendants from liability. Devlin v. Snellenberg, 132 Pa. 186.

The word "wilfully" means intentional, not malicious.

MUNDY and HICKERNELL for defendants.

The defendants acted in good faith.

"Wilfully," when used in penal statutes, means with evil intent, maliciously. Commissioners v. Ely, 54 Mich. 181; Anderson's Dictionary; 98 Cal. 268.

OPINION OF THE COURT.

Gentlemen of the Jury: Two questions of law arise in this action: 1. Is a tenant for years such an owner as is contemplated by the statute? 2. How is the word "wilfully" to be interpreted? As to the first proposition, it has been decided in Devlin v. Snellenberg, 132 Pa. 186, that a tenant cannot give a third person authority to paint an advertisement on the walls of the building of the reversioner, and the third party was held liable in nominal damages.

Although this was a civil suit, it determines the point of law that a tenant is not such an owner as is contemplated by the statute. Secondly, the word "wilfully" in this Act, we believe, means intention-

ally. Its meaning varies according to the context in which it is used.

It has been held in 5 Wharton 427, that in an indictment for arson the word "maliciously" was an equivalent for the word "wilfully." Chief Justice Shaw, in 20 Pickering 220, says the word "wilfully" means with evil intent. And in penal statutes the word "wilfully" generally signifies an act done wickedly or with malice.

Nevertheless, we have not been able to come to the conclusion that the framers of this Act meant that the painting must be done maliciously, wickedly or with evil intent, but rather believe they used the word "wilfully" in the sense of voluntarily or intentionally. Furthermore, we are of opinion that as defendants are presumed to know the law, they did the painting wilfully, *i. e.*, intentionally. Therefore, gentlemen of the jury, you will find the defendants guilty in the manner and form in which they stand indicted.

WILLIAM H. POINTS, J.

BOROUGH OF NEWVILLE vs. CARLISLE STREET RAILWAY CO.

Injunctions—Street railways—Consent of municipalities.

STATEMENT OF THE CASE.

The defendant corporation was chartered to build a street railway from the borough of Newville to Carlisle. The right to construct its road was granted by all the municipal authorities intervening along the line of the road.

Andrew Welty was the owner of a farm which crosses the road over which the railroad intends to build and he declines to give the company the right so to do.

The defendant has commenced to build its railroad upon the streets of Newville.

This bill is filed to restrain them from so doing.

KAUFFMAN and WRIGHT for plaintiff cited.

194 Pa. 539; 167 Pa. 75; 10 Sup. 413; 176 Pa. 559; 195 Pa. 502; 167 Pa. 62.

PEIGHTEL and PHILLIPS for defendant.

A company will not be enjoined because of refusal of an abutting owner to consent, it has failed to secure a continuous route. R. R. v. Ry. Co., 6 Dist. 487; Gillette v. Ry. Co., 2 Dist. 450.

OPINION OF THE COURT.

The Act of Assembly under which the defendant company was chartered, provides that "No street passenger railway shall be constructed by any company incorporated under this Act within the limits of any city, borough or township, without the consent of the local authorities thereof, nor shall any street passenger railway be incorporated hereunder which shall not have a continuous route from the beginning to the end." B. & L. Col. 4022. The defendant company has complied with these provisions by obtaining the consent of all the borough authorities along the route, also that of the intervening municipal authorities, township supervisors, who are the proper "local authorities" to give the consent required. The plaintiff seeks to restrain the defendant from building on its streets, contending that until Andrew Welty, the owner of a farm situated along the proposed route and between the terminal boroughs, shall give his consent the company has not secured such a "continuous route" as is required by the Act. It is clear that if one of the intervening municipalities had withheld its consent the others would not be bound, for mutuality of consent is just as requisite in a case such as this as in any other agreement. It is also well settled that street railways have not the right of eminent domain and the laying of railroad tracks on a suburban road is an additional servitude which cannot be imposed upon the owner of the fee against his will by the mere consent of the township authorities and the said owner may restrain by injunction such building. Penna. R. R. v. Montg. Co. R. R. Co., 167 Pa. 62; Penna. R. R. v. Street Ry. Co., 176 Pa. 559. But shall the simple withholding of his consent by one of the individual land owners, in a township whose officers have assented give to a borough, whose assent has also been officially given, the right to restrain the defendant from continuing work in the borough or is the borough bound by the mutuality of official consent already given? The statute clearly indicates that the latter view was the one in contemplation of the legislature. It requires the

consent of all the local authorities along the proposed route. This requirement has been met and such a continuous route has been provided. True, the railroad may not as yet pass Andrew Welty's farm; he may enjoin them when they attempt to do so, but as yet he makes no complaint. Arrangements may yet be made with him by agreement as to assessment of damages or otherwise to his satisfaction, but if not, in due season he will probably invoke the aid of the court in the protection of his individual rights as a land owner. He is the only one who can restrain, and we must hold the plaintiff borough bound by the mutual consent of its own and the officials of all of the various boroughs and municipalities. The prayer of the petitioner is therefore dismissed.

WILLIAM E. ELMES, J.

EZRA WHITE vs. WARREN ROBERTS.

Statute of frauds.

STATEMENT OF THE CASE.

One Harris owed White $100 for work done on a schooner belonging to Harris and as security for which White held possession of boat claiming a lien. Roberts had a chattel mortgage on the same boat for more than its value and was anxious to have White deliver to Harris in order that it might earn freight with which to pay the mortgage. Roberts verbally promised White to pay the one hundred dollars to him if he would surrender the boat, provided Harris did not pay him the $100 within 60 days. White gave up the boat. Harris did not pay $100. White sues Roberts.

CANNON and MCGUFFIE for plaintiff.

The promise was not within the statute of frauds. Taylor v. Preston, 79 Pa. 436; Arnold v. Steelman, 45 Pa. 186; Downing v. Funk, 5 Rawle 68; Giles v. Eckles, 9 Pa. 147.

SCHANZ and VASTINE for defendant.

Roberts' promise being a promise to pay the debt of another is within the statute of frauds. Miller v. Long, 45 Pa. 350; Cobt v. Page, 17 Pa. 469; Mauk v. Buknell, 50 Pa. 39; Nugent v. Wolf, 111 Pa. 471.

OPINION OF THE COURT.

We believe the necessary elements of a contract are found in this case, and the ability of the plaintiff to recover depends upon whether the agreement falls within the Statute of Frauds. The provision of the Statute is as follows: "No action shall be brought whereby * * * to change the defendant upon any special promise to answer for the debt or default of another unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person by him authorized." Thus if A says to B deliver goods to C and I will pay you for them, the promise of A would be an original contract, and would be binding although it were not written; but if A says to B deliver goods to C and if he does not pay for them I will pay you, this would be a collateral agreement to answer for the debt or default of another and would fall within the Statute and would have to be in writing.

Now in the case at bar A says to B surrender the boat to C and if he does not pay the $100 that he owes you within 60 days I will pay it. Thus far it would seem that this would fall within the Statute and so necessitate some memorandum, but we note that he has a special purpose for doing this, viz., that the boat may earn money to pay the mortgage that he holds on the same.

In 111 Metcalf 401, it was held that the Statute of Frauds was aimed at cases where a debt being due from one person, another engaged to pay it for him; but where one promises to pay the debt of another in order to release property in which he or his employe had an interest as to extricate property subject to distress on promising to pay the amount due, it was not within the Act. Perhaps we find more direct authority in Arnold v. Steadman, 45 Pa. 186, where a quotation is made from 2 Allen 423: "When the leading object of a promisor is to induce a promisee to forego some lien, interest or advantage and thereby confer on the promisor a privilege or benefit which he would not otherwise possess or enjoy, an agreement made under such circumstances and upon such a consideration is a new, original and binding

contract, although the effect of it may be to assume the debt and discharge the liability of another." Parson on Contracts say, "Whenever the main purpose and object of the promisor is not to answer for another but to subserve some purpose of his own, his promise is not within the Statute, although it may have the effect of extinguishing the liability of another." Chief Justice Sterrett said in a comparatively recent decision, that when the leading object of the promise is to subserve some interest of his own, notwithstanding the effect to pay or discharge the debt of another, his promise is not within the Statute.

In the case before us, while Roberts promised to pay the debt of Harris owing to White if not paid in 60 days, yet his chief purpose was to release the boat so that it might earn the money to pay off his mortgage. In the light of this interpretation and the authorities cited we would hold that the contract is binding between Roberts and White and that the plaintiff is entitled to recover.

E. H. BROCK, J.

JOHNSON'S ESTATE.

Witnesses — Decedent's estates — Wills— Statute limitations.

STATEMENT OF THE CASE.

Johnson left a will appointing his wife executrix. Having become criminally liable for embezzlement, he was obliged to appeal to his wife and her intimate friends for money with which to satisfy those whose moneys he had taken and avoid a prosecution. The understanding between him and them was that the occasion of the loan should never be revealed by them to anyone. In his will he said "I direct my executrix to pay to herself and to two other persons whom she knows, debts, of a confidential character, that I owe them." These debts were contracted May 17th and August 20th, 1891. He died February 11th, 1899. His will was written January 13th, 1896. His executrix filed an account, and an auditor made distribution in February, 1900. The widow claimed $1500 with interest from May 17, 1891, and John Sims and Harry Nollis claimed, each, $1000 with interest from August 20th, 1891. The only witness to prove the widow's claim was herself. She and Sims proved his claim, and she and Nollis his. The auditor disallowed the claims. Exceptions were (1) that the debts were legally proven, (2) they were not barred by the statute of limitations.

JOHNSTON and KERN for exceptants.

The claims of Sims and Nollis were sufficiently proven. Widow is competent to prove claims of others against her husband's estate. Stevens v. Cottrell, 99 Pa. 192; Robb's Appeal, 98 Pa. 501.

The acknowledgment in the will (in the nature of a bequest) prevents the debts from being barred. Patton v. Hessinger, 99 Pa. 311.

ALEXANDER and HENDERSON contra.

Widow's claim was not sufficiently proven. Brumer's Est. 6 Mont. 115; Heffner's Estate, 134 Pa. 436.

Testamentary direction to pay debts will not entitle them to payment as debts or legacies. The acknowledgment to be effectual must be made to creditor. Trickett on limitations, p. 345. Patton v. Hessinger, 59 Pa. 311.

OPINION OF THE COURT.

The first question presenting itself for our decision is: Were the claims of Mrs. Johnson and of Sims and Nollis legally proven?

The Act of May 23, 1887, Sec. 5, Cl. (e), provides that where any party to a thing or contract in action is dead * * * and his right thereto or therein has passed either by his own act, or by the act of the law to a party on the record, who represents his interest in the subject in controversy, neither the surviving or remaining party to such thing or controversy, nor any other person whose interest shall be adverse to the said right of such deceased * * * party, shall be a competent witness to any matter occurring before the death of said party.

By the construction of this clause, as declared in Dixon *et ux,* v. McGraw, 151 Pa. 100, the disqualification is made to depend not only on the fact of being a *remaining party* but having an *adverse interest.* (See also 4 Superior Ct. Rep., 267.)

In this case, the right of Johnson, one of the contracting parties, has passed, by

act of the law, into the hands of his executrix, Mrs. Johnson.

As to her claim, she is not only the *remaining party* to the alleged contract, with her husband, but she also has an interest, such as is described above, *adverse* to the right of said deceased husband. Consequently, she is clearly incompetent to testify in support of her own claim, and the claim being otherwise unsupported, must fall.

Sims and Nollis are, likewise, the remaining parties to their contracts with the deceased. They are also adversely interested, and consequently, incompetent. Their claims, therefore, rest solely on the testimony of Mrs. Johnson. Is she competent to testify in their behalf?

In Toomey's Appeal, 150 Pa. 535, Latimer, J., says: "By the express terms of the Act of '87 (May 23), the surviving party is incompetent to testify to matters occurring in the lifetime of the deceased. * * * By the letter of the Act of May 23, 1887, interested witnesses, in behalf of the estate, are competent to testify to *any* fact, whether occurring in the decedent's lifetime or not. The only interest which disqualifies is an interest adverse to the right of the decedent."

Following this ruling, and that in Horne & Co. v. Petty, 192 Pa. 33, we must say: Mrs. Johnson's interest is not adverse. On the contrary, she stands in Johnson's shoes, and it is equally in the interest of both to enlarge and increase, rather than diminish, the funds in the hands of the executor. Her testimony may diminish the fund, but if so, it is against her interest as well as that of decedent. It is, however, adverse interest, and not adverse testimony, that disqualifies.

Nor was she incompetent under clause (c) of said Act. What she proposed to testify was in no sense a confidential communication, hence the common law rule, protecting such communications, does not apply. "The wife after the death of the husband is competent to prove facts coming to her knowledge from other sources and not by means of her situation as wife, notwithstanding they relate to the transactions of her husband." Robb's Appeal, 98 Pa. 501.

It is therefore evident that the court below erred in rejecting the testimony of Mrs. Johnson in support of the claims of Sims and Nollis.

Did the court below err in holding that the claims were barred by the Statute of Limitations?

The following rule seems to be firmly established in Pennsylvania law: "To toll the bar of the Statute a promise to pay must be unequivocal and absolute; an acknowledgment clear and definite and consistent with such a promise and in either case made to the owner of the right of action, or to his agent in his behalf." Hostetter v. Hollinger, 117 Pa. 606.

No such promise or acknowledgment, made by the debtor in his lifetime, has even been intimated by appellants. No promise or acknowledgment in revival of the debts having been made, the debts were barred at the time of the death of Johnson, February 11, 1899. The one question, therefore, requiring our decision is, Did the testamentary provision give new life to the claims? This provision is, "I direct my executrix to pay to herself and to two other persons, whom she knows, debts of a confidential character that I owe them." It is a well established rule that where through laches or neglect debts have become barred, such debts will not be revived by the simple testamentary provision for the payment of debts. This common law ruling, found in Burk v. Jones, 2 Ves & Beam 275, and many subsequent English cases is frequently reiterated in the decisions of the courts of our own state, Agnew v. Fetterman, 4 Pa. 56; Buehler v. Buffington, 43 Pa. 278.

Were these general debts we should not hesitate in saying: "They are barred." But we must under the circumstances hold what evidently was the testator's intention that by directing his executrix "to pay to herself and to two other persons, whom she knows, debts of a confidential character that I owe them," he set apart such a portion of his estate as was necessary for the payment of these debts thus creating an express trust in the nature of a bequest.

Such being the case, it becomes immaterial whether the debts be legally proven or whether they be barred by the Statute of Limitations. "The Statute does not apply or extend to express trusts, which from their very nature can not be subjec

to limitation as long as the trust is undischarged." Walker v. Walker, et al, 16 S. & R. 379. Like rulings are made in Thompson v. McGaw, 2 Watts 161, and Man v. Warner, 4 Wharton 461.

For this reason, we must sustain the exceptions to the report of the Auditor, not only as to the claims of Sims and Nollis, but as to that of Mrs. Johnson as well.

F. A. MARX, J.

OPINION OF SUPERIOR COURT.

There are two questions: Did the decedent owe debts to his widow, to Sims and to Nollis? Are these debts barred by the statute of limitations?

The only evidence of the debt to the widow is her own testimony. At common law she could not have testified, nor has any statute been enacted that has conferred on her the competency to testify. The right of Johnson has passed to her as executrix but her claim as creditor is adverse to him and to herself as executrix. Johnson's will, however, directs her "to pay to herself and to two other persons, whom she knows, debts of a confidential character, that I owe them." He thus committed to her the decision as to the existence of the debts and the personality of the creditors. In effect, his words make a bequest to the widow of the money which she shall declare under oath, to be owing to her. As against all but creditors, he could have given the money to her, owed or not. He can therefore give it to her, on the footing of a debt, to be proven as such by her testimony. She had a right to prove the debt, in conformity with the condition of the bequest to her.

We assume that there are no creditors or that if there are, the estate is solvent because it does not appear that there are creditors or that the estate is insolvent. *Denon apparentibus et non existentibus, eadem est ratio.* Had there been creditors they would have claimed, not under, but in spite of the will. The estate being insolvent they could deny the right of another to support his claim as a creditor, except by legal proof. As against legatees, the will of the testator is the law. Bickel's Estate, 9 D. R. 129.

What has been said concerning the widow's debt of $1500, is applicable to the debts of Sims and Nollis. Johnson in substance gives to them what the widow knows to be due them. Her testimony would be the legal evidence of what she knew to be due them. But as the learned court below has said, she would be competent under the act of 1887. She is testifying not merely against her interest as executrix, but also against her interest as legatee or widow.

The debts are shown to have originated May 17 and August 20th, 1891. Johnson died February 11, 1899. The will was written January 13, 1896. These debts were barred, therefore, at Johnson's death, unless the will is an effectual admission of their not having been paid, or unless it is, in substance, a bequest to the creditors. We think the will is both an admission, and a bequest. As an admission it identifies the debt, through the knowledge of the executrix. But it is also a bequest. The money formerly due on a debt now barred may be the subject of a bequest.

Judgment affirmed.

JACOB ARNDT vs. SARAH ARNDT.

Action in Replevin.

STATEMENT OF THE CASE.

In April, 1900, Sarah Arndt left the house of her husband, the plaintiff in this action, taking with her personalty to the value of $500, which she still retains. The plaintiff claims the property, and brings this action. Witnesses for the plaintiff testified to the fact of desertion.

The defense called Sarah Arndt, offering to show by her that she left her husband with his consent. Competency of the witness objected to by the plaintiff. Objection overruled. Verdict for defendant. Motion for new trial. Refused.

PHILLIPS and MILLER for motion.

SHERBINE and BRENNAN contra.

OPINION OF THE COURT.

The question to be determined is whether Sarah Arndt was competent to testify that she left her husband with his consent.

The only grounds upon which a husband may sue his wife are found in the Act of June 8, 1893, P. L. 344, §3, which provides that hereafter * * * (a married man cannot) sue his wife * * * except

in a proceeding for divorce, or in a proceeding to protect or recover his separate property, whensoever she may have deserted him, or separated herself from him without sufficient cause. Presuming that the proceedings in the lower court were regular, this action must necessarily have been brought under this Act, and upon the supposition that the wife had deserted and had taken with her property belonging to the husband.

According to Paxson J., in City v. Williamson, 10 Phila. 179, "Property in possession of wife will be presumed to be the property of her husband. The onus is upon her to show that it is her separate estate, and how and from whom she acquired it." So we must conclude that the property taken by the wife was the separate property of the husband, there being nothing to indicate the contrary.

The Act of June 8, 1893, further provides that "In any proceeding brought by either under the provisions of section 3 to protect or recover the separate property of either, both shall be fully competent witnesses, except that neither may testify to confidential communications made by one or the other, unless this privilege be waived upon trial."

Unless the evidence offered came under the class of confidential communications between husband and wife, she was competent to testify. While it is true the wife was testifying against the husband's interest, yet she was not testifying to any communication.

New trial refused.

R. K. MacConnell, J.

OPINION OF THE SUPERIOR COURT.

This is an action by a husband as against his wife to recover certain personalty which she, on leaving him, took with her. There does not seem to have been any serious question that the property was his, and that she had no right to take it away. The husband, however, had no right at common law to sue the wife, and if he may now sue her, it is only in consequence of the Act of June 8, 1893, 2 P. & L. 2905. The third section of that Act permits him to sue her only "in a proceeding for divorce, or in a proceeding to protect or recover his separate estate, whensoever she may have deserted him, or separated herself from him without sufficient cause." Under this Act, the desertion or causeless separation is a condition precedent to the right to sue. The defense made by Mrs. Arndt is, not that she did not take the property, nor that it was not the plaintiff's, but that she had not deserted him, nor separated from him without sufficient cause.

There was evidence that she had separated from him. In the absence of evidence, this separation must, we think, be deemed to be without justification. The act of withdrawing from him is hers, and we cannot gratuitously assume her innocence in order to assume his guilt.

To overcome the presumption that the separation was causeless, Mrs. Arndt offered herself as a witness to prove that it had occurred with the consent of the plaintiff. This testimony would be against her husband, and, as well at common law as under the Act of May 23, 1887, P. L. 158, would be inadmissible. The fourth section of the Act of June 8, 1893, *supra*, enacts, however, that "In any proceeding brought by either under the provisions of section three, to protect or recover the separate property of either, both shall be fully competent witnesses, except that neither may testify to confidential communications made by one or [to?] the other, unless this privilege be waived upon the trial." 2 P. & L. 2890.

Under the act just cited, it is clear that Mrs. Arndt would be competent to prove that she had not taken the property, or that it was her own. It is supposed that she is not rendered competent to deny the fact which conditions the husband's right of action, viz.: her desertion or unjustifiable separation. Without this fact, it is suggested, the husband would have no right to sue, and it is only when he has a right to sue that she is rendered a competent witness. For her to testify that he has no right to sue, is to assume the right, in order to testify, and then, in testifying, to deny the right which was assumed to exist.

We are not convinced by this logic. The action predicates, it is true, the desertion by the wife, but it no less predicates the taking by her of property that belongs to

the husband. If she can deny none of these facts, the gift of the power to testify is vain. The meaning of the Act plainly is, that whenever an action is brought alleging desertion and the improper taking of property by the wife, she shall be competent to testify in her defense, and to testify in denial of any relevant fact.

Judgment affirmed.

JNO. MILLER vs. HENRY WELKER.

What constitutes an abandonment of an easement.

STATEMENT OF THE CASE.

Miller made a deed to Welker of a tract of land in which it was stipulated that Welker was to have a road over Miller's farm to the public road. This said tract adjoined other lands of Welker over which he could reach the public road, consequently he did not use the road granted by the deed or ever attempt to take possession until about 25 years after the grant.

About 25 years after said grant Welker sold part of his land cutting the tract bought *from Miller off from the road however retaining the right of way in this deed to the road.*

Finding the right of way granted in the deed from Miller to be more convenient, he attempts to use the way granted by the deed from Miller 25 years before. Miller brings action of trespass on the grounds that Welker had abandoned the easement. Miller had cultivated this land all the time while Welker had used another way to get to the public road and knew that Miller was cultivating this land which had been granted as a road by the deed from Miller.

Ten years before this action a tenant of Welker's, under Welker's authority, had *attempted to use this right* of way but when notified not to use it by Miller he desisted in his attempt to use it. Nothing further was done until this action.

J. McGUFFIE and G. S. MOWRY for plaintiff.

The right of way having its origin in a grant cannot be lost by mere non-user. Lindsey v. Lindeman, 69 Pa. 93; Twibill v. Lombard, 3 Spr. 483; 1 Trickett on Lim. 183. The three elements, non-user, intention to abandon, and damage to the owner of the servient estate must concur in order to extinguish easement. Tied. Real Prop. 574; Nitzell v. Paschall, 3 Rawle 81; Erb v. Brown, 69 Pa. 216; Butz v. Shire, 1 Rawle 218.

W. L. SCHANZ and S. LAUER for defendant.

A non-user for twenty-one years affords a strong presumption of abandonment. Nitzell v. Paschall, 3 Rawle 82; Corning v. Gould, 16 Wend. 528; Canny v. Andrews, 123 Mass. 157. Non-user coupled with a denial of the right will work an extinguishment.

Cases cited *supra.*

OPINION OF THE COURT.

It appears from the facts in this case that plaintiff conveyed a certain tract of land to defendant by deed in which it was stipulated that the latter should have and enjoy a road through the former's land adjoining so as to reach the public road.

Defendant used an adjoining tract of his own land for this purpose instead of the one granted by plaintiff. Ten years after the grant defendant's tenant under his authority attempted to use this road, which was refused. Fifteen years after this attempt and twenty-five years after the grant defendant made another attempt—the result of which is this action of trespass.

The vital question in this case is, whether the defendant has forfeited his right to use this road owing to his failure to exercise the privilege within the twenty-five years. We think he has not as there is no evidence of an intention on his part to do so, which is a necessary element in ascertaining whether there was in fact an abandonment.

An easement is defined to be a liberty, privilege or advantage, which one man may have in the lands of another without profit. (Stevenson v. Stewart 7 Phila. 293.) This privilege can be acquired only by grant, express or implied, or by prescription, which presuppose a grant to have existed. Defendant in this case acquired the right by express grant and it can only be lost by non-user coupled with an intention to abandon. Defendant contends that in order to recover, plaintiff must show some damage directly resulting from defendant's actions.

Now what have we in the case under consideration? The plaintiff contends that defendant has lost this privilege or

right by abandonment and the burden is therefore upon him to prove this allegation. It is an undisputed fact that defendant has made no use of the road for twenty-five years, but this mere non-user will not operate to extinguish this right. Tricket on Law of Limitations in Penna. sec. 136; Bombaugh v. Miller, 82 Penna. 203; Butz v. Iluie, 1 Rawle (Pa.) 218.

This is merely evidence of an intention to abandon, the strength of which depends on the whole of the circumstances of the case. The length of non-user is only a material element in the case as any non-user, irrespective of the time, accompanied by an act clearly indicating an intention to abandon, would effectually extinguish it.

The omission of an owner to occupy his house for any length of time would raise no presumption against his title to the property and the same reasoning applies with equal force to the case at bar. The mere fact that defendant saw fit not to use this right is no ground for depriving him of it.

In addition to evidence of non-user there must be shown acts of so decisive and exclusive character as to indicate some intention to abandon. Nitzell v. Paschall, 3 Rawle (Pa.) 81; Erb v. Brown, et al, 69 Penna. 216.

Nothing less than an absolute denial of the right, accompanied by an enjoyment inconsistent with its existence for twenty-one years can extinguish it. Lindsey v. Lindeman, 69 Penna. 93; Buckholder v. Sigler, 7 W. & S. 154; Tinbill v. Lombard Ry. Co., 3 Sup. Ct. 487.

Non-user for the period of twenty-five years, under such circumstances as show an intention to abandon, is sufficient to extinguish it and even an abandonment for a shorter time, under circumstances which show an intention to give up an easement, which is acted upon by the grantor and he should be damaged if the right was afterward asserted, would operate to extinguish it.

The Pennsylvania courts in a long line of cases have decided that the owner of an easement may abandon it, but mere non-user does not show an abandonment, to produce this effect the non-user must originate in or be accompanied by some decided and unequivocal acts of the owner inconsistent with the continued existence of the easement and showing an intention on his part to abandon it.

The evidence in the case under consideration fails to show any intention on part of defendant to abandon this right, but tends to establish the reverse from the fact that the tenant, ten years after the grant and with his authority, had attempted to use it. We take this to be conclusive proof of defendant's intention to hold this right. This element being vital to plaintiff's cause we would be justified in giving judgment for defendant.

The other contention of defendant, viz.: "that plaintiff must have suffered some damage"—we think does not enter into the consideration of this case, but if it did plaintiff has utterly failed to show any. As we said above the question is one of intention, depending upon the facts of each particular case—Snell v. Levitt, 110 New York 604. Plaintiff has in fact suffered no material damage, but has benefited, being enabled to cultivate and use this portion of the land reserved for defendant and thereby giving him a ready return for his labor in selling its products in the markets. Although unnecessary in coming to a decision we have given this phase of defendant's contention our attention owing to the prominence given it by them in their argument.

Again the defendant was under no duty to claim the right of way when he knew that plaintiff was cultivating this portion of his land. It was rather the plaintiff's duty to refrain from any acts that would in any manner prove destructive to the easement granted. He improves or cultivates the land at his own risk.

It follows from what has been said, that as plaintiff has failed to prove an abandonment of the easement, judgment should be entered for defendant.

C. SUMNER DAVIS, J.

MARTHA ORR vs. WILLIAM QUIRK

Liability of photographer for misuse of picture of patron—Mental anguish as cause of action.

STATEMENT OF FACTS.

The plaintiff employed the defendant, a photographer, to take a picture of her, and to furnish a dozen copies for which he was paid.

Some months thereafter a newspaper desired to print a picture of the plaintiff, and induced the defendant to furnish an extra copy from the plate in his possession. This he did.

The plaintiff brings this action to recover $5000 damages for the injuries she has sustained by reason of mental anguish.

WILLIAMSON and MUNDY for plaintiff.

There is an implied contract on the part of the photographer not to sell or exhibit a picture, and he is liable for allowing it to be published. Pollard v. Photographic Co., L. R. 40 Ch. Div. 345; Moore v. Rugg, 44 Minn. 28.

Damages may be recovered for the mental anguish. Phelin v. Kenderline, 20 Pa. 354; Milliken v. Long, 188 Pa. 411.

WELSH and WATSON for defendant.

Damages are not recoverable if the injuries sustained are the result of mental anguish and suffering alone. Fox v. Barkey, 126 Pa. 164; Ewing v. Ry Co., 147 Pa. 40; Pa. Ry Co. v. Graham, 63 Pa. 290; Ritch v. Sanders, 2 Forum 37; Hann v. Ry Co., 5 Forum 42; Sedgwick on Damages, 103 and 104.

OPINION OF THE COURT.

However much our sympathies may be enlisted in favor of one whose sensibilities have been shocked by the notoriety arising from the unauthorized publication of her photograph, we must declare that the law makes no provision for compensating in damages the "mental anguish" which may be suffered in such a case.

In Pollard v. Photographic Co., 40 ch. D. E. L. R. 345, decided in 1889, the photographer mounted unauthorized copies of the photograph of a customer, and having added decorations appropriate to the season, exposed them for sale as Christmas cards. The bill of the plaintiff prayed for an injunction to restrain the further sale of her photograph. The court held that it was within its jurisdiction to grant an injuction on two distinct grounds:

(a). "I hold that the bargain between the customer and the photographer includes, by implication, an agreement that the prints taken from the negative are to be appropriated to the use of the customer only."

(b). "Where a person obtains information in the course of a confidential employment, the law does not permit him to make any improper use of the information so obtained, and an injunction is granted, if necessary, to restrain such use; as for instance, to restrain a clerk from disclosing his master's accounts, or an attorney from making known his client's affairs, learned in the course of such employment."

It was contended by the counsel for the defendant that an injunction could be granted only in those cases where there was an injury to property in respect of which damages could be recovered in an action at law. The court was careful to emphatically deny this doctrine and cited the well-known case of Prince Albert v. Strange, 1 Mac & G. 25. The inference, clearly, was that the court realized that the case presented no ground for an action at law. In this connection we find some dicta on this question of damages. "Supposing," said the court, "that the present photograph actually was or that by manipulation of the negative, or by the addition of the rest of the figure, or of a background, it was rendered a libel upon the plaintiff, by exposing them for instance, to contempt or ridicule, it is quite clear that in such a case a court of law could give damages." After a careful study of this case, cited by the plaintiffs in this action, we are convinced that the most favorable construction that could be put upon its doctrines would not justify the recovery of substantial damages in a case like the present one. To say that the mere publication of a photograph in a newspaper is libelous would be going quite too far, and in the absence of any information as to the character of the photograph in question we cannot assume that it possessed any unusual features such as would expose the subject to ridicule or contempt. Without fully evidence there clearly can be no recovery on this ground.

Let us grant, then, a breach of good faith and of an implied contract. Will a court of law give substantial damages in a case like the present? The cases cited by the plaintiff as well as those cited by the defendant, show conclusively that, to recover substantial damages for a breach of contract, actual damages must be shown. Mental suffering alone has always been held to be too elusive to estimate and to be too easily feigned to be admitted alone as a ground for the recovery of damages. If the act itself is a tort and produces the slightest physical injury to which the "mental anguish" can be attributed, this latter may then be considered as a basis for additional damages If a case does not come within slander *per se* or libel, it appears that the law offers no redress for merely wounded feeling.

In Moore v. Rugg, 44 Minn. 28, a photographer printed an extra copy of a negative and gave it to a detective who used it in a highly improper manner. The defendant was ignorant of the use to which it was to be put, but the court held that there was a breach of an implied contract, that there was a ground of action, and that nominal damages at least might be recovered. The case is very meagerly reported and fails to state what was the alleged loss or injury. It, however, is no precedent for the recovery of substantial damages.

The jury is instructed to render a verdict for the plaintiff for six cents damages and six cents costs.

JOSEPH P. MCKEEHAN, J.